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PUBLIC PROSECUTOR

v.

MOHD. GHAZALI BIN IBRAHIM

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDDIN BIN MOHD YUNUS
b [CRIMINAL REVISION NO. 43-2-95]
13 MARCH 1995

CRIMINAL LAW & PROCEDURE: *Trial - Presiding Magistrate trying case involving own brother - Propriety of trial - Likelihood of bias - Whether Magistrate ought to disqualify himself - Revision of order - Whether called for - Criminal Procedure Code ss. 323, 325,*
c *439.*

The defendant was charged with two offences under the Road Traffic Act 1987, for driving a car with an expired road tax and without an insurance coverage. The defendant pleaded guilty to the charges whereupon the learned Magistrate, who was the defendant's brother, admonished and discharged the defendant on both charges. Following a written complaint
d by a member of the public, and pursuant to the provision of s. 323 of the Criminal Procedure Code, the records of this case was called up for examination by the learned High Court Judge, Alor Setar. The sole issue that arose was whether the learned Magistrate herein ought to have disqualified himself, bearing in mind his kinship to the defendant, as well as s. 439 of the CPC.

Held:
e **[1]** It is well established that kinship does disqualify a Judge wherever it is close enough as to cause a real likelihood of bias. The underlying principles behind this are that justice should not only be done but should appear manifestly to be done and that no man should be judge of his own cause.

[2] The Court is not concerned with the question of whether or not the learned Magistrate
f was actually biased. Rather the Court looks at the impression which would be given to other people. Even if the Magistrate herein was impartial as he could be, if there was a real likelihood of bias on his part, of which there is no doubt here, then he should not sit. And if he does sit his decision cannot stand.

Per Curiam: I hope the present case serves as a reminder to Magistrates that they must always uphold public confidence and respect in the administration of justice, and that
g confidence is destroyed when members of the public have a plausible reason to believe that the Magistrate is likely to be biased.

[Magistrate's order set aside. A retrial before another Magistrate ordered].

Cases referred to:
Leeson v. General Council of Medical Education and Registration [1889] 43 Ch.D 366 ***(refd)***
h *Reg. v. Hertfrdshire Justices 6 Q.B. 753* ***(refd)***
Reg. v. Farrant 20 Q.B. D ***(refd)***
Brookes v. Earl of Rivers [1668] Hardres 503 ***(refd)***
Bridgman v. Holt [1693] 1 Show PC 111 ***(refd)***
Cheah Yoke Thong v. Public Prosecutor [1984] 2 MLJ 119 page 121 ***(refd)***
Metropolitan Properties Co. v. Lannon [1968] 3 All ER 304 ***(refd)***

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Legislation referred to:
Road Transport Act 1987, ss. 23(1), 90.
Criminal Procedure Code of ss. 323, 325, 439.

For the prosecution - Azmi bin Ariffin, DPP.
For the defendant - in person.

JUDGMENT

Mohd. Hishamudin bin Mohd. Yunus J:

The defendant was charged before the Magistrate Court for two traffic offences: for driving a car with an expired road tax (contrary to s. 23(1) of the Road Transport Act 1987 - "the RTA") and without an insurance coverage (contrary to s. 90 of the RTA). He pleaded guilty to both charges. He was admonished and discharged by the presiding Magistrate.

Following a written complaint to the High Court by a member of the public, and pursuant to s. 323 of the Criminal Procedure Code, I called for the records of this case. The complaint is that the presiding Magistrate had been unfairly lenient in dealing with the case as the defendant is his brother. The learned Magistrate, in his letter to this Court, admitted that the defendant is his brother. The state of affair is regretted, not so much because that there has been a breach of the Criminal Procedure Code, but more because it effects public confidence in the judiciary. For "Judges, like Caesar's wife, we should be above suspicion" (per Bowen L.J. in *Leeson v. General Council of Medical Education and Registration* [1889] 43 Ch.D., 366 at 385).

Under English law, any interest or probability of bias is sufficient to disqualify a justice acting in a judicial inquiry - *Reg. v. Hertfrdshire Justices* 6 Q.B. 753. This rule is also laid down by Mr. Justice Stephen in *Reg. v. Farrant* 20 Q.B. D. 58. As stated in the head-notes, it is as follows:

> Any pecuniary interest in the subject-matter of ligitation, however slight, will disqualify a Magistrate from taking part in the decision of a case. If a Magistrate has such a substantial interest, other than pecuniary, in the interest of the hearing, as to make it likely that he will have a bias, he is disqualified.

Despite a seventeenth century decision that kinship did not operate as disqualification for a Judge (*Brookes v. Earl of Rivers* [1668] Hardes 503), it is now well established that it does disqualify wherever it is close enough to cause a real likelihood of bias. Indeed, in *Bridgman v. Holt* [1693] 1 Show PC 111 Chief Justice Holt withdrew from a case in which his brother was a party. The underlying principles are that justice should not only be done but should appear manifestly to be done and that no man should be a Judge of his own cause.

The principle governing personal interest and disqualification is codified in our Criminal Procedure Code. Section 439 of the code states:

> 439. Magistrate not to act where interested.
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> No Magistrate shall, except with the permission of the High Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested.

It is also relevant here to refer what Salleh Abbas L.P. said on the law on bias in *Cheah Yoke Thong v. Public Prosecutor* [1984] 2 MLJ 119 at page 121 (although the facts in that case do not concern kinship):

> The law on bias which disqualifies an adjudicating officer from an adjudication is summarised in the Latin maxim "nemo debet esse judex in propria causa", meaning no one should be Judge in his own cause. This time-honoured principle is based on the desirability of maintaining public confidence and respect in the administration of justice. Thus, no one who is himself a party to the proceedings or who has any direct pecuniary interest in the result is qualified to adjudicate in those proceedings. But the Court will not disqualify him merely because of his words, deeds or his association with a party who is instituting or defending the proceedings before him unless the circumstances of the case show that there is real likelihood or reasonable suspicion of bias (de Smith's, 4th Ed. p. 251).

The learned Magistrate, in his letter to the High Court, explained that his order to admonish and discharge his brother was based purely on the merits of the case. He maintained that he had acted impartially. With due respect, he seems to have missed the point. This Court - and s. 439 - is not concerned with whether he was actually biased or otherwise. As Lord Denning emphasized in *Metropolitan Properties Co. v. Lannon* [1968] 3 All ER 304 the Court does not look at the mind of the Judge himself: "The Court looks at the impression which would be given to other people. Even if he was impartial as he could be, nevertheless, if right minded persons would think that, in the circumstances, there was a 'real likelihood' of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

In the circumstances, in exercise of the power of revision vested in me by s. 325 of the Criminal Procedure Code, I set aside the order of the Magistrate. There shall be a retrial before another Magistrate. The defendant is to appear at the Magistrate Court on 19 March 1995 at 9 a.m. to answer the charges.

I hope the present case serves as a reminder to Magistrates that they must always uphold public confidence and respect in the administration of justice, and that confidence is destroyed when members of the public have a plausible reason to believe that the Magistrate is likely to be biased.